No. 87-121

IN THE

Supreme Court of the United States

October Term, 1987

RICHARD L. DUGGER, et al., Petitioners,

v.

AUBREY DENNIS ADAMS, Jr., Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Does this Court's holding in Caldwell v. Mississippi, 472 U.S. 320 (1985), which forbids the suggestion to a capital sentencing jury that responsibility for determining the appropriateness of a death sentence rests with the reviewing court, apply to the Florida advisory jury system where the trial judge makes the final sentencing decision?

2. Can a claim premised on Caldwell v. Mississippi, be considered on federal habeas upon a finding of "novelty" when the claim was not presented in the first habeas petition and the state courts have refuse· to consider the claim, which was not raised at trial, on direct appeal or in the first collateral attack in state court?

LIST OF PARTIES

The petitioners are Richard L. Dugger, Secretary, Department of Corrections, and Robert A. Butterworth, Attorney General of the State of Florida. The respondent is Aubrey Dennis Adams, Jr.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. p. 1a) is reported at 804 F.2d 1526. The opinion of the court of appeals on petition for rehearing (Pet. App. p. 78a) is reported at 816 F.2d 1493. The opinion of the district court (Pet. App. p. 43a) is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on November 13, 1986 (Pet. App. p. 1a). A petition for rehearing was denied on April 23, 1987 (Pet. App. p. 78a). A suggestion for rehearing en banc was denied on June 10, 1987 (J.A. 96). Mandate has been stayed during the pendency of this proceeding. The petition for a writ of certiorari was filed on July 20, 1987 and was granted on March 7, 1988. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

Aubrey Dennis Adams, Jr. was convicted in October 1978 of the first degree murder of eight-year-old Trisa Gail Thornley. Following the jury's recommendation, the trial judge imposed the

death sentence in January 1979.[1] (Pet. App. p. 1a).

At the beginning of jury selection for Adams' trial, the judge, who is the sentencer, in an explanation of Florida's bifurcated procedure, discussed the nature and effect of the jury's recommended sentence in a capital murder trial with the initial panel of prospective jurors. He informed them of the advisory nature of their sentencing recommendation, the fact that he could disregard it and sentence Adams to life or death, and that the decision is on his conscience (J.A. 15-20). He gave a substantially similar explanation of the jury's role each time new prospective jurors were seated (J.A.

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[1] The particular facts of the crime, though not relevant to this proceeding at this time, can be found in more detail in Adams v. State, 412 So.2d 850 (Fla. 1982) and Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985).

20-79). Each time this explanation was given, however, it was accompanied by an explanation that the jury's advisory sentencing verdict was to be based on the finding and weighing of aggravating and mitigating factors (J.A. 18-19; 26-27; 32-33; 38; 44-45; 51-52; 59-60; 67-68; 75-76). When two prospective jurors indicated that their opposition to the death penalty would keep them from recommending a death sentence, he probed the strength of their convictions, without objection, in terms of whether they could not "vote for a recommendation to the Judge for a death penalty, even though the Judge is not bound to follow it." (Pet. App. p. 40a).

During the penalty phase the jury was properly instructed under Florida law as to the fact that its sentencing recommendation is only advisory and that "the final decision as to what punishment

shall be imposed rests solely upon the Judge of this Court." (J.A. 85). Fla. Std. Jury Instr. (Crim.) 2.09. The jury was properly instructed as to the finding and weighing of the mitigating and aggravating circumstances and its duty to follow the law in rendering an advisory sentence and that the verdict should be based upon the evidence (J.A. 85-91). It was further instructed not to "act hastily or without due regard to the gravity of these proceedings" and told to "carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake." (J.A. 93).

In final closing argument, the prosecutor acknowledged that the jury's recommendation was advisory and admonished the jurors to be fair and impartial to the defendant and also to the people of the State of Florida and that "any way you people decide will satisfy the State of

Florida." (J.A. 84-85).

No objection to such comments was interposed during voir dire. Defense counsel was satisfied with the formal jury instruction at the penalty phase and never requested an alternate or more comprehensive instruction. The propriety of the judge's remarks was never raised as an issue on direct appeal. Adams collaterally challenged his judgment and sentence in state and federal courts upon the signing of a death warrant, never raising this issue, and all relief was denied. Adams v. State, 456 So.2d 888 (Fla. 1984); Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985).

Two days prior to his second scheduled execution, Adams, for the first time, raised the issue that the trial judge's remarks violated the tenets of Caldwell v. Mississippi, 472 U.S. 320 (1985), in a second motion to vacate

judgment and sentence, which was denied by the trial court on March 3, 1986. The Florida Supreme Court affirmed this denial, finding that all newly raised grounds for relief should have been presented on direct appeal or in the first motion to vacate judgment and sentence and were barred from review as an abuse of procedure and by caselaw. Adams v. State, 484 So.2d 1216, 1217 (Fla. 1986). The court expressly and exclusively relied on the bar raised by state procedural barriers and never reached the merits of the claim. This Court denied Adams' petition for writ of certiorari to the Supreme Court of Florida. Adams v. Florida, 106 S.Ct. 1506 (1986).

Adams then filed a second habeas petition on March 5, 1986 (Pet. App. p. 45a). The district court did not reach the merits of the claim, finding the failure to raise it in the first petition

was an abuse of the writ, and that the claim had also been procedurally defaulted upon in the state courts (Pet. App. 57a). Counsel offered as justification for not raising this new claim in the previous petition the novelty of the Caldwell decision (Pet. App. p. 57a). The district court determined that the claim derived no merit from Caldwell because the trial judge, and not the jury, is the sole sentencer in Florida (Pet. App. p. 58-59a). Adams subsequently appealed to the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit Court of Appeals reversed the district court's denial of a writ of habeas corpus with regard to the Caldwell claim and remanded the case to the district court with instructions to issue the writ of habeas corpus if the State of Florida does not afford Adams a new sentencing proceeding before an

untainted jury (Pet. App. p. 34a). The court found the Caldwell decision to be applicable to Florida's sentencing scheme and concluded that the judge's statements to the jury were misleading (Pet. App. p. 7, 16a). The court ignored procedural bars, finding Caldwell to be a significant change in the law so as to excuse the failure to raise the claim in the previous habeas petition and to establish cause to excuse procedural default in state court, as attorneys lacked the tools to raise this eighth amendment claim until the Caldwell decision (Pet. App. p.80-81; 104-105a). The court found, as well, that Adams was prejudiced by the failure to raise the claim (Pet. App. p. 108a).

SUMMARY OF ARGUMENT

1. At the time Aubrey Dennis Adams, Jr. filed his first habeas petition in September, 1984, there was a considerable body of state and federal law indicating

that a capital sentencing jury's sense of responsibility for sentencing cannot be diminished. All that is required under Engle v. Isaac, 456 U.S. 107, 133-134 (1982) is that the basis of a constitutional claim be available, not that it be spelled out in any particular constitutional terms. The state of the law in 1984 provided ample thread from which to weave the eighth amendment claim recognized in Caldwell v. Mississippi, 472 U.S. 320 (1985), so that the failure to do so must necessarily be attributable to inexcusable neglect or deliberate withholding. Consideration of the merits of such claim should have been precluded by the application of the abuse of the writ doctrine.

2. From the time of trial in 1976 to collateral attack in state court in 1984, eighth amendment jurisprudence had sufficiently evolved to allow for the

fashioning of this claim. Caldwell has not been held to have retroactive application. The Caldwell decision did not overrule one of this Court's precedents or disapprove a practice this Court has arguably sanctioned. Such argument has been uniformly condemned even pre-Furman by legal authorities. Under such circumstances, the finding that the novelty of the claim excuses earlier presentation of it must necessarily rest upon a misapplication of Reed v. Ross, 468 U.S. 1 (1984).

3. Under Florida procedure, the trial judge imposes sentence and the jury merely renders an advisory recommendation as to whether it believes a capital defendant should receive a sentence of life imprisonment or death. In Mississippi the jury is the sentencer. Statements correctly informing the jury of its advisory role do not support a claim

based on Caldwell v. Mississippi. Even if a jury could be found not to have taken its advisory role seriously, there are no eighth amendment Caldwell-type implications under Florida's tripartite sentencing scheme in which jury misadvice can never evolve into an actual sentence.

ARGUMENT

I

THE ABUSE OF THE WRIT DOCTRINE PRECLUDED CONSIDERATION OF THE MERITS OF RESPONDENT'S HABEAS CORPUS CLAIM THAT THE JURY'S SENSE OF RESPONSIBILITY FOR SENTENCING WAS DIMINISHED AS THE FAILURE TO RAISE THE CLAIM EARLIER WAS DUE TO INEXCUSABLE NEGLECT OR DELIBERATE WITHHOLDING.

Unlike the situation in Caldwell v. Mississippi, 472 U.S. 320 (1985)[2], this

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[2] In Caldwell v. Mississippi, 472 U.S. 320 (1985), this Court was considering the application of the Mississippi death penalty procedure. Under the Mississippi procedure, the jury makes the final determination of whether to impose the sentence of life or death. That sentence cannot be overridden by the trial judge and is subject to review only by the Supreme Court of Mississippi. In Caldwell, the prosecutor, in his final argument, commented: "Now, they would have you believe that you're going to kill this man and they know - they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it." 472 U.S. at 325.

In explaining the Mississippi procedure, this Court quoted with approval from one of the dissenting opinions which stated: "The [mercy] plea is made directly to the jury as only they may impose the death sentence. Under our standards of appellate review mercy is irrelevant." Id. at

case comes before the Court after federal review on the merits in the face of a finding of abuse of the writ because respondent failed to raise a Caldwell claim in the first petition for writ of habeas corpus. (Pet. App. p. 57a). Counsel offered as justification for not raising the claim in the previous petition the novelty of the decision in Caldwell. (Pet. App. p. 57a).

The Court of Appeals for the Eleventh Circuit held that the district court abused its discretion in finding abuse of the writ as there was no evidence that the failure to raise the claim in the earlier

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331. This Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-329. The present case differs from Caldwell in several crucial respects.

petition was the result of inexcusable neglect or deliberate withholding, as the Caldwell decision was not available to respondent at the time he filed his first petition in September 1984 (Pet. App. p. 80a).

The lower court further found that the eighth amendment argument was not one of which the respondent should have been aware at the time of filing his first petition, as the claim is not one which had been raised and considered in a number of other cases at the time of that petition and the precedents of this Court at that time did not make it evident that such statements by the trial judge implicated the Eighth Amendment. The court found that precedent, specifically this Court's decision in California v. Ramos, 463 U.S. 992 (1983), indicated that the contrary was true (Pet. App. p. 82a). Although the court noted that

statements regarding appellate review such as those involved in Caldwell had been held to be reversible error as a matter of state law by a number of states, it reasoned that the mere fact a practice may be condemned as a matter of state law does not indicate that the same practice constitutes an eighth amendment violation (Pet. App. p. 86a).

At issue preliminarily is whether the decision in Caldwell is so novel as to preclude application of the abuse of the writ doctrine or whether the claim was available so that the failure to present the claim in the first petition was necessarily attributable to inexcusable neglect or deliberate withholding.

It is clear that a successive petition for habeas corpus that raises claims which could and should have been raised in a prior habeas corpus petition constitutes an abuse of the writ. Woodard

v. Hutchins, 464 U.S. 377 (1984). A district court need not consider a claim raised for the first time in a second habeas petition unless the petitioner establishes that the failure to raise the claim earlier was not the result of intentional abandonment or withholding or inexcusable neglect. Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts.

To the extent that second and successive federal habeas corpus petitions involve the danger that a condemned inmate might attempt to use repeated petitions and appeals as a mere delaying tactic, the state has quite a legitimate interest in preventing such abuses of the writ. Barefoot v. Estelle, 463 U.S. 880, 895 (1983). It is only the rare case in which the prisoner supplements his constitutional claim with a colorable showing of factual innocence that the ends

of justice require federal courts to entertain successive habeas corpus petitions. Kuhlmann v. Wilson, 106 S.Ct. 2616, 2627 (1986). This is so even though "the concept of 'actual' as distinct from 'legal' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense." Smith v. Murray, 106 S.Ct. 2661, 2668 (1986).

Under established doctrine the district court was correct in concluding that respondent had, indeed, abused the writ. Claims must be included in a prior petition if a competent attorney should have been aware of the claims at the time of the prior petition. Jones v. Estelle, 722 F.2d 159, 169 (5th Cir. 1983) (en banc). The trial lawyer in this case had the responsibility to raise this claim and could have. In Caldwell this Court indicated that the claim was not a novel

one and recounted the long history of the claim and noted uniform condemnation of such argument by legal authorities and state courts even prior to Furman v. Georgia. Caldwell v. Mississippi, supra, 105 S. Ct. at 2642. Indeed, the Florida case of Blackwell v. State, 76 Fla. 124, 79 So. 731, 735-736 (1918), virtually mirrors this Court's decision in Caldwell.[3] See also, Pait v. State, 112 So.2d 380, 383-384 (Fla. 1959). At the time of respondent's first habeas petition the Eleventh Circuit Court of Appeals had considered the argument that prosecutorial and judicial comment on the appellate process rendered a petitioner's trial fundamentally unfair in violation of the due process clause of the Fourteenth

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[3] The Mississippi Supreme Court decision in Caldwell was available, as well, at the time of the first habeas petition, framing such arguments in an eighth amendment context. 443 So.2d 806 (1983).

Amendment. E.g., Corn v. Zant, 708 F.2d 549, 557 (11th Cir. 1983); McCorquodale v. Balkcom, 705 F.2d 1553, 1556 (11th Cir. 1983).

Justice Stevens also articulated similar concerns in a concurring opinion in 1983 in Maggio v. Williams, 464 U.S. 46 (1983):

> In my opinion, the argument was prejudicial to the accused, both because it appears to have misstated the law and because it may have led the jury to discount its grave responsibility in determining the defendant's fate. A prosecutor should never invite a jury to err because the error may be corrected on appeal. That is especially true when the death penalty is at stake.

464 U.S. at 55.

It must be stressed that all that need be available is the **basis** of a constitutional claim.[4] See, Engle v. Isaac, 456 U.S.

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[4] "The entire thrust of the 'new law' exception to the abuse of the writ doctrine is to

107, 133-134 (1982). A habeas petitioner need not wait for subsequent acceptance of an argument. See, Smith v. Murray, 106 S.Ct. 2661, 2666 (1986).

It is clear that had respondent, on the basis of readily available case precedent, fashioned this claim, federal courts would have appropriately considered it on the merits without the need to recite book and verse of the Constitution. See, Anderson v. Harless, 459 U.S. 4 (1982); Picard v. Connor, 404 U.S. 270 (1971).

The state and federal court rulings cited above are also significant because they evince other defendants' recognition prior to Caldwell v. Mississippi, that a

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excuse claims based on 'unanticipated' changes in the law, not to allow a petitioner to sit back and ignore his nascent claims until a majority of the Supreme Court announces a favorable decision." Moore v. Kemp, 824 F.2d 847, 872 n. 31 (11th Cir. 1987), cert. granted, 43 Cr.L. 4013 (April 18, 1988).

capital jury's sense of responsibility for imposition of the death sentence cannot be diminished. Adams, therefore, had ample thread from which to weave the eighth amendment claim recognized in Caldwell when he first sought federal habeas relief in September 1984. The failure to present the claim in the first petition can only be attributed to inexcusable neglect or deliberate withholding. "In sum, if a petitioner fails to prosecute a claim when its factual and legal bases are present, two inferences are permissible: either he is deliberately withholding the claim, perhaps with the idea of asserting it in a subsequent petition, or he is simply neglecting to pursue it." Moore v. Kemp, 824 F.2d 847, 863 (11th Cir. 1987), cert. granted, 43 Cr.L. 4013 (April 18, 1988). (TJOFLAT, Circuit Judge, concurring in part and dissenting in part, in which VANCE, Circuit Judge, joins).

The court of appeals has managed to avoid such a finding in this case by ignoring the doctrine of abuse of the writ. The court refused to find a third layer of state procedural default in this case and focused, therefore, only on the state of the law at the time of trial and appeal and applied Reed v. Ross, 468 U.S. 1 (1984), to reach the merits of the claim. Respondent, however, is not automatically excused, as well, under the abuse of the writ doctrine from pressing this claim in his first petition for writ of habeas corpus. The state of the law at the time respondent filed his first habeas petition in 1984 should have been more fully considered by the court below.

Contrary to the finding of the lower court, this Court's opinion in California v. Ramos, 463 U.S. 992 (1983), did not indicate that such statements by a trial judge had no eighth amendment

implications. Ramos required this Court to consider the constitutionality under the Eighth and Fourteenth Amendments of instructing a capital sentencing jury regarding the Governor's power to commute a sentence of life without possibility of parole. This Court ultimately determined that the Eighth and Fourteenth Amendments did not prohibit such an instruction nor did the failure of such instruction to inform the jury of the Governor's power to commute a death sentence violate the Constitution. 463 U.S. at 1006, 1011.

This Court discussed its earlier Ramos decision in Caldwell and stated "[c]reating this image in the minds of the capital sentencers is not a valid state goal, and Ramos, is not to the contrary. Indeed, Ramos, itself never questioned the indispensability of sentencers who 'appreciat[e]...the gravity of their choice and...the moral responsibility

reposed in them as sentencers." 105 S.Ct. at 2643.

Ramos did nothing to detract from the doctrine set forth in Woodson v. North Carolina, 428 U.S. 280 (1976), that a death sentence must rest upon a consideration of the character and record of the individual defendant and the circumstances of the particular offense and that because of the qualitative difference between death and a sentence of imprisonment there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. 428 U.S. at 394-395.

This Court did not simply distinguish Ramos but clearly indicated that the Mississippi Supreme Court was wrong in interpreting Ramos as sanctioning such statements. A "sanctioning" of this type of statement is simply not apparent from

one lone, incorrect state appellate decision.

An interpretation of Ramos as leaving the decision of whether to inform the jury of extraneous matters with the individual states is not a reasonable interpretation and ignores the simple fact that the instruction in Ramos was correct; the instruction in Caldwell was not. If anything, Caldwell is simply an extension of Ramos and pre-existing eighth amendment jurisprudence.[5] The decision below must,

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[5] Caldwell, himself, relied upon Ramos, as well as Woodson v. North Carolina, 428 U.S. 280, 304 (1976) and Proffitt v. Florida, 428 U.S. 242, 251-252 (1976) in bringing his case before this Court (Pet. App. 120a). The petitioner in Moore v. Blackburn, 774 F.2d 97, 98 (5th Cir. 1985) found the tools to raise this claim pre-Caldwell, by virtue of the opinions in Ramos, Lockett v. Ohio, 438 U.S. 586, 605 (1978) and Gregg v. Georgia, 428 U.S. 153, 199, 206-207 (1976). (Pet. App. 11a-119a). Indeed, this Court stated in Caldwell, that "...this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the state." 105 S.Ct. at 2640. Such a premise has been made clear in numerous opinions. See, McGautha v. California,

therefore, be reversed.[6]

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402 U.S. 183, 208 (1971); Eddings v. Oklahoma, 455 U.S. 104, 118 (1978); and Gardner v. Florida, 430 U.S. 349 (1977) as well as the cases relied upon by petitioners above. Eighth amendment jurisprudence was certainly sophisticated enough to allow a defendant faced with a jury with a diminished sense of responsibility to fashion this claim.

[6] Moreover, the ends of justice do not demand consideration of the merits of the claim. Adams has never supplemented his constitutional claim with a colorable showing of factual innocence. He has neither demonstrated the inapplicability of the agggravating factors actually found nor proffered substantial mitigating evidence not fully considered; pointed to any distortion in the weighing process vis-a-vis a proportionality analysis; or demonstrated that the trial judge's responsibility for sentencing was diminished, so as to determine that he was conclusively entitled to a sentence less than death. He has certainly not demonstrated "innocence" in the sense of being innocent of any statutory aggravating circumstance essential to eligibility for the death penalty.

II

THE STATE COURT DECISION RESTED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS AS THE STATE SUPREME COURT ACTUALLY RELIED ON ITS PROCEDURAL BARS FOR ITS DISPOSITION OF THE CASE AND THE MERITS OF THE CLAIM WERE ENTERTAINED ON FEDERAL REVIEW BY VIRTUE OF A MISAPPLICATION OF THIS COURT'S DECISION IN REED V. ROSS, 468 U.S. 1 (1984).

In Caldwell v. Mississippi, 472 U.S. 320 (1985), unlike the present case, the defendant had objected to the Mississippi prosecutor's comment. The subject "Caldwell" claim was not objected to at trial, argued on direct appeal or raised in the first collateral attack in state court. The state applied its procedural default rules and refused to entertain the claim.[7] See, Adams v. State, 484 So.2d

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[7] Florida's state courts follow their own procedural rules. Sinclair v. Wainwright, 814 F.2d 1516, 1522 (11th Cir. 1987). The Supreme Court of Florida plainly invoked its procedural default rule in regard to this claim. Florida, in

1216 (Fla. 1986).

Although federal courts retain the power to look beyond state procedural forfeitures, the exercise of that power is inappropriate unless the defendant succeeds in showing both "cause" for noncompliance with the state rule and

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fact, has never excused a Caldwell, claim from state procedural requirements. See, e.g., Combs v. State, 13 F.L.W. 142 (Fla. Feb. 18, 1988); Grossman v. State, 13 F.L.W. 127 (Fla. Feb. 18, 1988); Demps v. State, 515 So.2d 196 (Fla. 1987); Card v. Dugger, 512 So.2d 829 (Fla. 1987); Blanco v. Wainwright, 507 So.2d 1377, 1380 (Fla. 1987); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987); Aldridge v. State, 503 So.2d 1257 (Fla. 1987); State v. Sireci, 502 So.2d 1221, 1224 (Fla. 1987); Darden v. State, 475 So.2d 217, 221 (Fla. 1985); Middleton v. State, 465 So.2d 1218, 1226 (Fla. 1985). The supreme court's notation that Caldwell is not applicable to Florida's sentencing scheme certainly does not mean that the application of such bar was dependent upon an antecedent ruling as to whether federal constitutional error had been committed. Moreover, unlike the situation in Ake v. Oklahoma, 470 U.S. 68 (1985), in Florida, federal constitutional errors are not "fundamental" errors to which Florida's waiver rule would not apply. Clark v. State, 363 So.2d 331 (Fla. 1978); Sanford v. Rubin, 237 So.2d 134 (Fla. 1970).

"actual prejudice resulting from the alleged constitutional violation." Wainwright v. Sykes, 433 U.S. 72, 84 (1977). "...Concerns for finality and comity are virtually identical regardless of the timing of the defendant's failure to comply with legitimate state rules of procedure." Smith v. Murray, 106 S.Ct. 2661, 2666 (1986). While it is true that when "a constitutional claim is so novel that its legal basis is not reasonably available to counsel" at the time of a petitioner's state court procedural default, the petitioner has cause for the failure to raise the claim in accordance with the state procedural rule pursuant to Reed v. Ross, 468 U.S. 1, 16 (1984), such novelty is premised upon a "lack of tools to construct a constitutional claim." If such tools are available, then the claim is not sufficiently novel to constitute cause for failure to comply with state

procedural rules because "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default." Engle v. Isaac, 456 U.S. 107, 133-134 (1982). "[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Smith v. Murray, 106 S.Ct. 2661, 2667 (1986). By the above standards, a finding of cause for Adams' triple procedural default by the Eleventh Circuit was wholly inappropriate.

Perhaps the clearest indicator that such claim was not sufficiently novel to constitute cause for failure to comply with state procedural rules is the fact that the Court which authored the opinions

in Sykes, Murray, Ross, and Engle, would not undertake review in Caldwell, until it assured itself that the state court decision did not rest upon adequate and independent state grounds. Caldwell, supra, 105 S.Ct. at 2638.

As fully argued in Point I, eighth amendment jurisprudence had evolved to the degree that at the time of trial and direct appeal respondent had the necessary tools to fashion this claim. As long ago as the pre-Furman case of McGautha v. California, 402 U.S. 183 (1971), Justice Harlan, writing for the Court, upheld a capital sentencing scheme in spite of its reliance on jury discretion. The sentencing scheme's premise, he assumed, was **"that jurors confronted with the truly awesome responsiblity of decreeing death for a fellow human will act with due regard for the consequences of their decision."** 402 U.S. at 208.

At the time of Adams' first collateral attack in state court in 1984, he had a considerable body of federal law, as well as state law, on which to rely.[8] Adams also had the benefit of this Court's decision in California v. Ramos, 463 U.S. 992 (1983), which was sufficient, along with pre-existing eighth amendment jurisprudence, for Bobby Caldwell to bring his claim before this Court. He even had the benefit of the state court opinion in Caldwell. It is also clear that at this point in time other defendants had the

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[8] The court of appeals, however, has sidestepped consideration of this third layer of default by construing the opinion of the Florida Supreme Court as barring only those claims that had been considered and ruled upon in the previous motion for post-conviction relief as an abuse of Florida's post-conviction procedure (Pet. App. p. 89a, footnote 3). A fair reading of the opinion of the Florida Supreme Court simply does not support this finding. See, Adams v. State, 484 So.2d 1216, 1217 (Fla. 1986). This is especially so since Florida Rule of Criminal Procedure 3.850 specifically bars successive motions raising new and different grounds as an abuse of procedure.

tools to raise this claim. See, Moore v. Blackburn, 774 F.2d 97 (5th Cir. 1985).

Respondent cannot rely on the novelty of his legal claim as "cause" for noncompliance with Florida's rules just because the subsequent Caldwell decision made counsel's task easier. If this were so, an application of Reed v. Ross would turn each new decision emanating from this Court into cause and prejudice for ignoring an otherwise valid procedural bar. This would be an incongruous result where, as here, various forms of the claim respondent now advances have been percolating in the lower courts for years. Cf., Smith v. Murray, 106 S.Ct. 2661, 2667 (1986).

A finding of novelty in this case so as to establish cause to excuse respondent's procedural default rests upon a misapplication of Reed v. Ross, in which this Court had articulated a constitu-

tional principle that had not been previously recognized but which was held by this Court to have retroactive application. 468 U.S. at 17.

Even under such an analysis a finding of novelty is not warranted. As previously argued, the very language of this Court in Caldwell indicates that such decision did not overrule the decision in Ramos, so as to satisfy the first situation described in Ross, that a decision of this Court explicitly overrule one of its precedents, or the third situation, that the decision disapprove a practice this Court arguably sanctioned in prior cases. 468 U.S. at 17. This Court further noted uniform condemnation of such argument by legal authorities and state courts even prior to Furman v. Georgia. Caldwell, supra, 105 S.Ct. at 2642. Thus, the decision in Caldwell certainly did not "overturn a long standing and widespread practice to

which this Court had not spoken, but which a near-unanimous body of lower court authority had expressly approved." Reed v. Ross, supra, 468 U.S. at 17. The present case simply does not fall within the ambit of Ross, so as to justify a finding of cause for Adams' procedural default.[9]

In an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default. Murray v. Carrier, 106 S.Ct. 2639, 2650 (1986). But, there is nothing "'fundamentally unfair' about enforcing

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[9] The decision below was not based on the issue of retroactivity and the same need not be considered by this Court. The petitioner in no manner concedes that Caldwell should be retroactively applied, however, and suggests that the position taken by the amicus is correct.

procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination." Smith v. Murray, 106 S.Ct. 2661, 2668 (1986). Translated into sentencing terms, Adams has never demonstrated his entitlement to a sentence less than death.

A sentence of death should not be disturbed, as the Eleventh Circuit seems to suggest, on the basis that the judge found an equal number of mitigating and aggravating factors (Pet. App. p. 18a). This is especially true in the case of a grisly child-murder, where great weight could be placed upon the aggravating factor that the murder was heinous, atrocious and cruel. The more reasonable approach is that suggested in the dissent in Moore v. Kemp, 824 F.2d 847, 878 (11th Cir. 1987), cert. granted, 43 Cr.L. 4013 (April 18, 1988) in which "innocence" is

interpreted as being innocent of any statutory aggravating circumstance essential to eligibility for the death penalty.

The test enunciated by Wainwright v. Sykes, 433 U.S. 72 (1977) is two-pronged: a habeas petitioner must show both cause and prejudice for his procedural default in state court. Unlike the situation in Ross, prejudice is not here conceded. Reed v. Ross, supra. 468 U.S. at 9. Respondent had the burden below of "showing not merely that the errors created a possibility of prejudice but that they worked to his actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982). Such burden has not been met in this case.

Upon finding that the judge's statements to Adams' jury violated the

principles enunciated in Caldwell and that such misstatements were in no way cured during the bifurcated proceeding, the Eleventh Circuit seemed to automatically find that Adams was prejudiced by the failure to raise this claim (Pet. App. p. 108-109a).

It is clear, however, that the effect such comments have on sentencing must be looked to not only in determining the applicability of Caldwell, but in undertaking a rational prejudice analysis. In Darden v. Wainwright, 106 S.Ct. 2464, 2473 n. 15 (1986), this Court indicated that the fact that such comments were made at the **guilt-innocence** stage of trial greatly reduced the chance that they had **any** effect at all on sentencing. In the present case the challenged comments were one further step removed and made during **voir dire**, lessening **still** any chance that they had any effect at all on

sentencing. Such comments, in fact, occurred in the context of a most generalized explanation of Florida's bifurcated procedure. While, no doubt the respondent will point to the frequency of such comments in support of his position, it should be remembered that this later advocate was not the same attorney as at trial, who stood objectionless, and in the course of a trial for a heinous child-murder, had more than a passing interest in having death-scrupled veniremen serve on the jury.[10] "The failure of otherwise competent defense counsel to raise an objection at trial is often a reliable

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[10] At this point in time this issue could have been resolved, as well, on the basis of state law based on the 1975 decision in Tedder v. State, 322 So.2d 908 (Fla. 1975), which held that the jury's advisory sentencing recommendation must be given great weight. This fact highlights the fallacy of allowing defense attorneys to lie in wait for a decade for federal pronouncements when they had adequate tools to have an issue resolved at the time of trial.

indication that the defendant was not denied fundamental fairness in the state court proceedings. The person best qualified to recognize such error is normally a defendant's own lawyer." Rose v. Lundy, 455 U.S. 509, 547-548 n. 17 (1982) (Stevens, J., dissenting).

To obtain collateral relief from errors in a jury charge the petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process and that the error worked to his substantial disadvantage. Henderson v. Kibbe, 431 U.S. 145, 154-155 (1977); United States v. Frady, 456 U.S. 152, 168-170 (1982).

The actual instruction given at the penalty phase in this case was not even an ailing one, even by the newly articulated standard of the Eleventh Circuit (J.A. 85). In the recent en banc decision in

Harich v. Wainwright, No. 86-3167, slip op. at 18-19 (11th Cir. April 21, 1988), the Eleventh Circuit concluded, as did the Supreme Court of Florida before it, that emphasizing the "advisory" role of the jury, or the fact that the jury is making a "recommendation" to the judge, does not support a Caldwell claim, as such statements are neither inaccurate nor misleading. See also, Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1986). Moreover, juror knowledge of its advisory role would seem to militate toward an exercise in leniency. See, Dobbert v. Florida, 432 U.S. 282, 294 n. 7 (1977).

Thus, prejudice has inappropriately been found in this case based on comments made two proceedings removed from those in Caldwell, which could only have resulted in the inclusion of those jurors **least** inclined to have returned a recommendation of death, who were always aware that the

judge could choose to follow their advice and who were told prior to their deliberations that "human life was at stake." (J.A. 93).

III

THIS COURT'S DECISION IN CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985), THAT A CAPITAL SENTENCING JURY MAY NOT BE TOLD THAT ITS DECISION IS SUBJECT TO FURTHER REVIEW DOES NOT APPLY TO THE FLORIDA ADVISORY JURY SYSTEM WHERE THE TRIAL JUDGE MAKES THE FINAL SENTENCING DECISION.

Florida procedure is clearly distinguishable from the Mississippi procedure considered in Caldwell v. Mississippi, 472 U.S. 320 (1985). The Florida procedure does not empower the jury with the final sentencing decision; rather, the trial judge imposes the sentence. A reading of section 921.141, Florida Statutes (1985), explains the respective roles of the jury and the judge. That statute provides in part:

> (2) **ADVISORY SENTENCE BY THE JURY** - After hearing all the evidence, the jury shall deliberate and render **an advisory sentence to the court,** based upon the following matters:

> (3) **FINDINGS IN SUPPORT OF SENTENCE OF DEATH** - Notwithstanding the recommendation of a majority of the jury, **the court**, after weighing the aggravating and mitigating circumstances, **shall enter a sentence** of life imprisonment or death...

Clearly, under our process, the court is the final decision-maker and the sentencer - not the jury. This Court, in describing the Florida death penalty process, has expressly characterized the jury's role in Florida to be "advisory" in nature. Justice Blackmun, writing for the majority in Spaziano v. Florida, explained our procedure in the following manner:

> In Florida, the jury's sentencing recommendation in a capital case is only advisory. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances and, "[n]otwithstanding the recommendation of a majority of the jury," is to enter a sentence of life imprisonment or death; in the latter case, specified written findings are required. Fla. Stat. §921.141(3) (1983).

468 U.S. at 451. See also, Barclay v. Florida, 463 U.S. 939 (1983); Dobbert v. Florida, 432 U.S. 282 (1977); Proffitt v. Florida, 428 U.S. 242 (1986).

The division of authority between the jury and the trial judge under the Florida death penalty statute has been upheld against constitutional challenge in Spaziano v. Florida, 468 U.S. 447 (1984) and Proffitt v. Florida, 428 U.S. 242 (1976).

The Supreme Court of Florida expressly approved in In re Standard Jury Instructions in Criminal Cases, 327 So.2d 6 (Fla. 1976), penalty phase jury instructions which explain to the jury its advisory role under Florida's process. Although the instructions have been modified and amended in 1981, In re Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla.), modified, 431 So.2d 599 (Fla. 1981), and in 1985, The

Florida Bar re Standard Jury Instructions Criminal Cases, 477 So.2d 985 (Fla. 1985), the language has remained the same, and consequently, has been used in virtually every death penalty case in this state since 1976, including the present one. The last paragraph of the instruction, which was also given in this case (J.A. 93), clearly emphasizes the importance of the jury's role:

> The fact that the determination of whether you recommend a sentence of death or sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

Fla. Std. Jury Instr. (Crim.) (for §921.141, Fla. Stat.)

If Caldwell were applied strictly in

accordance with the decision below, Florida's standard jury instructions, as they have existed since 1976, would necessarily have to be found to violate the dictates of Caldwell, which would result in a resentencing proceeding for virtually every individual sentenced to death in this state since 1976. No justification exists for such a conclusion, and even the Eleventh Circuit seems to have subsequently retreated from such a hardline approach in the recent case of Harich v. Wainwright, No. 86-3167 (11th Cir. April 21, 1988).

One concern expressed in Caldwell was that a **sentencing** jury, "unconvinced that death is the appropriate punishment, ...might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts." The jury might thus tend to sentence the defendant to death "because the error may be corrected on

appeal." This Court feared that a defendant might be executed, "although no sentencer had ever made a determination that death was the appropriate sentence." Caldwell, supra, 472 U.S. at 331-332. The appellate court in Caldwell would have had to rely on appellate briefs and transcripts to make a determination of whether death was appropriate. This is not the situation in Florida. Florida's juries play an advisory role in the sentencing process and the trial judge is the sentencer. Combs v. State, 13 F.L.W. 142, 144 (Fla. Feb. 18, 1988). The Florida trial judge, like the jury, hears firsthand all testimony and evidence. See, Harich v. Wainwright, No. 86-3167, Slip op. at 19, n. 13.

In Spaziano v. Florida, 468 U.S. 447, 465 (1984), this Court recognized that the advice of a jury is not the equivalent of a judgment, which is imposed by the

judge. In reaching this result this Court was aware of the decision in Tedder v. State, 322 So.2d 908 (Fla. 1985). 468 U.S. at 466-467. The Supreme Court of Florida recently reaffirmed that the judge is the sentencer and that it had no intention of changing the clear statutory directive that the jury's role is advisory when it held in Tedder that before a judge may override a jury recommendation of life imprisonment, he must find the facts are "so clear and convincing that virtually no reasonable person could differ." The court further indicated that it had approved the jury instructions referred to above after the Tedder decision. Combs v. State, 13 F.L.W. 142, 144 (Fla. Feb. 18, 1988).

In view of the fact that the trial judge is the acknowledged sentencer it is hard to see how Caldwell could have any applicability to Florida, as opposed to

Mississippi, where the jury is the sentencer. There is virtually no statement which could diminish the jury's sense of responsibility for sentencing, because the jury is not the sentencer in the first instance.

In particular, statements informing the jury of its advisory role or the fact that it is making a recommendation to the judge do not support a Caldwell claim, as the Eleventh Circuit recently acknowledged. Harich v. Wainwright, No. 86-3167, slip op. at 18-19 (11th Cir. April 21, 1988). Caldwell does not require that an advisory jury be misinformed or tricked into believing that it is the actual sentencer. Cf., Spaziano v. Florida, 468 U.S. 447, 456 (1984) (Beck v. Alabama, 447 U.S. 625 (1980) does not require that the jury be tricked into believing that it has a choice of crimes for which to find the defendant guilty, if

in reality there is no choice). Caldwell does not prohibit an accurate statement of the law concerning the advisory nature of the jury recommendation. Justice O'Connor's separate opinion on which the Caldwell decision rests made clear that there was no constitutional bar to accurately instructing a sentencing jury on the law. 472 U.S. at 341. Clearly, there also can be no bar to accurately instructing a non-sentencing jury of its advisory role.

Both state and federal courts are now in agreement that in Florida the judge is the true sentencer and the lower federal court has been forced to acknowledge the inapplicability of Caldwell to statements that apprise the jury of its advisory role. The Eleventh Circuit, however, seems to cling tenaciously to the idea that despite the fact that the jury is not the sentencer, it cannot be too vehemently

apprised of this fact, even outside of the penalty proceeding, lest it's advisory recommendation be rendered in an atmosphere of frivolity. There are several problems with such an approach.

If advising the jury of the advisory nature of its role during the **penalty phase** is not improper, it is hard to imagine that extraneous comments in recognition of such fact during **lesser phases** of the bifurcated proceeding could rise in level of importance under Caldwell than the penalty phase instructions. This is contrary to the indications of this Court in Darden v. Wainwright, 106 S.Ct. 2464, 2473 n. 15 (1986). Moreover, the jury either is or is not the sentencer. If it is not, as all courts now agree, then there is no reason why it should be made to feel that the taking of a life by the state should fall directly upon its shoulders. Thus, while the reasoning of

the Eleventh Circuit has limited the application of Caldwell somewhat since the decision below, it still requires that the jury be misled, or at the least, shielded from reality, because of its refusal to recognize the simple inapplicability of Caldwell.

There are even more compelling reasons for recognizing the inapplicability of Caldwell to Florida's capital sentencing scheme. Florida's tripartite sentencing system is uniquely designed to eliminate sentencing distortion to the degree humanly possible. Pursuant to this statute the court makes the final determination, after receiving the advice of the jury, and may only impose death after making a written finding that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. It is the judge who must justify the sentence in his

written findings. Fla. Stat. §921.141 (1985). It is the finding and weighing of the circumstances which justifies the imposition of the death penalty; it is also the means by which the sentencing judge and the Florida Supreme Court could determine that a jury's **recommendation** was, in fact, not distorted.

The Florida Supreme Court found in this case that the jury and judge acted with procedural rectitude in applying the statute and that the aggravating and mitigating circumstances **were** supported by the evidence. Adams v. State, 412 So.2d 850 (Fla. 1982). This Court has indicated that it is not the function of a federal court to decide whether it agrees with the majority of the advisory jury or with the trial judge and the Florida Supreme Court when, **regardless of the jury's recommendation,** there is an independent review of the evidence by the trial judge

and there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence in cases in which both the jury and the trial court have concluded that death is the appropriate remedy. Spaziano v. Florida, 468 U.S. 447, 467 (1984).

Chief Justice Rehnquist, dissenting, in Caldwell, felt that vacation of the death sentence was not warranted, even under the Mississippi system where the jury is the sentencer, simply because a procedure by which it was imposed was in some way flawed where the sentencer's discretion was suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. 105 S.Ct. at 2649. This reasoning has been controlling in the context of Florida's "tripartite" sentencing scheme. See, Wainwright v. Goode, 464 U.S. 78

(1983), Barclay v. Florida, 463 U.S. 939 (1983), see also, Zant v. Stephens, 462 U.S. 862 (1983).

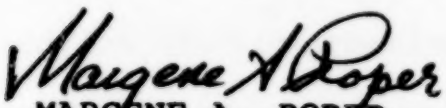
Thus, the willingness of the court below to find eighth amendment implications and constitutional error is in stark contrast to prior decisions of this Court. Florida's procedure, unlike Mississippi's simply precludes any possible misadvice of a jury from ever evolving into an actual sentence.

CONCLUSION

The decision of the Eleventh Circuit Court of Appeals should be reversed and the petition for writ of habeas corpus denied.

Dated: May, 1988

Respectfully submitted,



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